Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

October Term, 1997

LINDA E. STANLEY, and JOHN F.
TAYLOR, PETITIONERS

v.

JOHN M. BOLES, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE MAINE SUPREME JUDICIAL COURT

PETITION FOR WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED FOR REVIEW

I. Did the Maine Supreme Judicial Court, sitting as the Law Court, deprive the plaintiffs of their right to due process under the Fourteenth Amendment to the United States Constitution by denying their appeal and motion for rehearing and affirming the Superior Court's order dismissing the plaintiffs' complaint for failure to prosecute for failing to appear at trial on very short notice after the trial court had previously informed the parties that they would be afforded about five weeks notice of trial and the clerk later had indicated to plaintiffs' counsel that the case would not be called on the list on which it was called, when due to such short notice the plaintiffs' were unable to obtain the appearance of one of their two witnesses who was then residing in London, U.K., and the only plaintiff physically and mentally capable appearing and testifying was precluded from doing so by circumstances beyond her control including travel and scheduling complications resulting from the requirements of her employment as a senior official of the United States Department of Justice?

II. Did the Maine Supreme Judicial Court, sitting as the Law Court, deprive the plaintiffs of their right to due process under the Fourteenth Amendment to the United States Constitution by denying their appeal and motion for rehearing and affirming the Superior Court's order dismissing the plaintiffs' complaint for failure to prosecute for failing to appear at trial on very short notice after the trial court had previously informed the parties that they would be afforded about five weeks notice of trial and the clerk later had indicated to plaintiffs' counsel that the case would not be called on the list on which it was called, when due to such short notice the only plaintiff physically and mentally capable appearing and testifying was precluded from doing so by circum-

stances beyond her control including her inability to purchase, for want of availability, a seat on a plane flying from Washington, D.C. to Portland, Maine in time to appear and testify at trial?

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DECISIONS AND ORDERS ENTERED BELOW

The decision of the Maine Supreme Judicial Court, sitting as the Law Court, in Linda E. Stanley, et al. v. John M. Boles dated December 31, 1996 is an unpublished memorandum of decision, Decision No. 7894.

With respect to that decision and the related order of January 22, 1997 denying the petitioners' motion for rehearing, which appear in full in the Appendix to this petition as Items 1 and 5 respectively, reference is made to Docket No. CUM-96-263 of the Maine Supreme Judicial Court.

With respect to the relevant unpublished opinion, which appears in full in the Appendix to this petition as Item 4, and orders of the Superior Court for the County of Cumberland and State of Maine, each of which is included in the Appendix to this petition as Items 2 (order of March 19, 1996 denying motion to vacate dismissal) and 3 (order of February 2, 1996 dismissing plaintiffs' complaint), reference is made to Docket No. CV-92-1380 of the Superior Court for the County of Cumberland and State of Maine.

JURISDICTION

The judgment of the Maine Supreme Judicial Court, sitting as the Law Court in this matter, was issued December 31, 1996. It was stayed by the operation of the Maine procedural rule allowing aggrieved parties a period in which to file motions for rehearing or reconsideration. The petitioners, plaintiffs and appellants below, filed a timely motion for rehearing which was denied on January 22, 1997. This petition for writ of certiorari was filed by first class (priority) mail within the 90 day period from the order denying the petitioners' motion for rehearing as permitted by Rule 13 of the Supreme Court Rules. The Superme Court of the United States of America has jurisdiction with respect to this matter pursuant to the provisions of Article III, Section 2, of the Constitution of the United States as this matter is one arising under the Fourteenth Amendment to the Constitution of the United States, and pursuant to the provisions of 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This matter involves Section 1 of the Fourteenth Amendment to the Constitution of the United States which is set forth below.

FOURTEENTH AMENDMENT
to the
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Facts

The plaintiffs, Linda E. Stanley and John F. Taylor, are attorneys at law duly admitted to practice in and before the courts of the State of California. At the time their claim against the defendant arose, they were partners in the San Francisco law firm of Taylor & Stanley.[1]

In 1987 and 1988, the defendant, John M. Boles, retained the law firm of Taylor & Stanley to perform legal services on his behalf and for his benefit with regard to certain commercial matters including defending an action brought by Lloyd R. Crenna against Mr. Boles to recover attorneys' fees of approximately $27,000.00, defending an action brought by Bank of America against the defendant to recover attorneys' fees of aprroximately $50,000.00, proceedings to set aside a $165,000.00 judgment against Mr. Boles in a previous action brought by Bank of America, a contemplated action for breach of fiduciary duty against a group of individuals or entities denominated as English Bond Holder, and other matters. By April 30, 1989, Mr. Boles owed the plaintiff $22,355.46 for legal services and related expenses. In November or December of 1989, Mr. Boles, using a check drawn against an account in the name of The London Manhattan

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1. The partnership has ceased doing business and Plaintiff John F. Taylor has since withdrawn from the practice of law. Plaintiff Linda E. Stanley, who was the managing partner, is now the partner charged with dissolving the partnership. In 1994 she was appointed United States Trustee for Region 17, which includes the Northern and Eastern Districts of California and the District of Nevada. Her office is located in San Francisco, California.

Co., Inc.,[2] paid $1,000.00 on his account leaving a balance of $21,355.46 due and owing the plaintiffs. The plaintiffs made demand for payment, but no further payment was received.

After Mr. Boles moved to Maine, the plaintiffs retained Maine counsel to collect the unpaid attorneys' fees and expenses.

Procedure

The original complaint was filed on December 7, 1992, and Defendant John M. Boles was duly served in hand two days later.

During the course of a motion hearing on July 27, 1996, the Court initiated a discussion about scheduling for trial during which the plaintiffs' counsel informed the Court that, because the demands of Plaintiff Linda E. Stanley's employment as United States Trustee for Region 17 made it virtually impossible for her to appear on short notice, because Plaintiff Stanley, who was an essential witness,[3] resided in California, and because

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2. Two corporate entities, Boles & Company and The London Manhattan Co., Inc., initially were named defendants in the plaintiffs' action. After it became apparent that Mr. Boles had created multiple corporations with names identical to those of the two corporate defendants and, in any case, that the plaintiffs had been paid for all services they had rendered with respect to The London Manhattan Co., Inc., both corporations were dismissed, The London Manhattan Co., Inc. with prejudice and Boles & Company without prejudice.

3. Plaintiff Stanley, in her capacity as liquidating partner, was the custodian of the business and other records of former law firm of Taylor & Stanley. Plaintiff Taylor, who had been peripherally involved in the work for Mr. Boles, was mentally and physically incapcitated and unable to testify.

the plaintiffs' other withness (the attorney who had performed virtually all the services the plaintiffs former law firm rendered for Mr. Boles) was living in London, the plaintiffs anticipated filing a motion for special assignment. The Court then told counsel that the case would be placed first on a trial list to begin on a Monday, that the parties would thus be afforded about five weeks notice of trial, and that that was as close to a special assignment as the parties would get.

The Court's pronouncement notwithstanding, the case appeared on a trial list for January and February of 1996. After the trial list was published, the plaintiffs' counsel contacted personnel in the Clerk's office about the trial schedule, reiterated the substance of the Court's July 27, 1995 pronouncement, and understood that the case would not be called. On Friday, January 26, 1996, the plaintiffs' counsel received a message indicating that the case was then the number two back up for Monday, January 29, 1996. Upon calling the San Francisco office of Plaintiff Linda E. Stanley, the plaintiffs' counsel was informed that she was in the field in Nevada and would not return to San Francisco before Monday, January 29, 1996. The plaintiffs' counsel then filed a motion to continue trial in which the plaintiffs expressly raised the issue of notice with regard to the trial and the plaintiffs' reasonable reliance on the July 27, 1995 pronouncement of the court and their subsequent understanding from personnel in the clerk's office that the case would not be called, as well as reiterating the problems related to obtaining the attendance at trial of both Plaintiff Stanley and Mr. Reiff. See Motion to Continue, App. pp. A-13 - A-16.[4]

After a conference with the Court in chambers, and several telephone calls between counsel and their respective clients, each other and the Clerk, the case was set for trial to begin the morning of Wednesday,

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4. References to the Appendix to this petition are indicated, e.g., as "App. pp. A-13 - A-16."

January 31, 1996. Plaintiff Linda E. Stanley, who was scheduled to fly to Washington, D.C., on January 30, 1996, had managed to rearrange her schedule to permit her to fly to Portland Tuesday evening for the trial beginning the following day. When she got to Washington, however, she was unable to get on the flight to Portland and was unable to get a seat on an alternate flight. Having been unable to fly to Portland that Tuesday evening, she managed to reschedule her Thursday obligations in Washington, made arrangement to fly to Portland to arrive by 10:00 a.m. on Thursday, and so informed the plaintiffs' counsel late that evening. See Affidavit of Linda E. Stanley, App. A-26 - A-29.

After a conference in chambers on January 31, 1996, counsel for the plaintiffs reiterated on the record that Plaintiff Linda E. Stanley was not present and why, counsel for the defendant recited his history of alleged discovery offenses, and the Court called the case for trial and defaulted to plaintiffs for failure to prosecute. See Transcript excerpt, App. A-4 - A-11.

The plaintiff filed a timely motion to vacate the order dismissing the plaintiffs' complaint together with supporting affidavits. The motion, which tolled the applicable appeal period, again raised the issues of notice and the plaintiffs' reliance on the court's pronouncement regarding trial scheduling. The supporting affidavits provided uncontroverted detailed accounts of the court's trial scheduling pronouncement, the subsequent related conversation between the plaintiffs' counsel and personnel in the clerk's office, counsel's efforts to contact and obtain the attendance of Plaintiff Stanley, Plaintiff Stanley's diligent effort to appear for trial, and evidence, including more than 75 pages of ducuments, establishing the plaintiffs' prima facie case. App. pp. A-17 - A-29.[5]

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5. The affidavit establishing the plaintiffs' prima facie case, which has no direct bearing on their petition, has been omitted from the appendix.

The plaintiffs' motion was summarily denied, and the plaintiffs' timely appealed. App. pp. A-2, A-29 - A-30.

On appeal, the plaintiffs' argued among other things that the court's denial of the motion to continue, dismissal of the complaint and denial of the motion to vacate the dismissal were abuses of the court's discretion and, with the following language, specifically raised the constitutional issue with respect to which the plaintiffs now petitions for a writ of certiorari:

> The Fourteenth Amendment to the United States Constitution requires that the plaintiffs be given a meaningful opportunity to assert their claim(s), and the dismissal of their complaint in this case deprived them of the constitutionally guaranteed right to a fair trial and due process of law.[6]

The Maine Supreme Judicial Court, sitting as the Law Court, in an unpublished memorandum of decision and without opinion or explanation other than a reference to its decision in Westbrook v. Wallace, 478 A.2d 687, 689 (Me. 1984), affirmed the trial stating only that "the court's decision to dismiss for want of prosecution was within the proper exercise of its discretion." App. p. A-1.

The plaintiffs filed a timely motion for rehearing in which they again raised the "plaintiffs' constitutionally protected right to due process" and distinguished the circumstances of plaintiffs' case from those in the Westbrook case cited by the Law Court in their case and from the facts in Link v. Wabash Railroad Company, 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1386 (1962) which was cited by the Law Court in its decision in the Westbrook case. See motion for rehearing, App. A-36 - A-41. The plaintiffs' motion for rehearing was summarily denied on January 22, 1997. App. p. A-42.

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6. See excerpt from petitioner's brief below, App. A-31 - A-35.

ARGUMENT

The Maine Supreme Judicial Court, sitting as the Law Court, has deprived the plaintiffs of property, their cause of action in the case below, in a manner offensive to the fundamental right to due process guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States. In so doing, the Law Court, Maine court of last resort, has decided an important question of Constitutional law in a way that conflicts with the decisions of this Court or, alternatively, has decided an important question of Constitutional law which should be settled by this Court. Additionally, the Law Court's decision conflicts with the decisions of various United States Courts of Appeals and other state courts of last resort.

Except for its reference to Westbrook v. Wallace, 478 A.2d 687 (Me. 1984), the Law Court, without opinion or other explanation, summarily announced in its unpublished memorandum of decision that the trial court's dismissal of the plaintiffs' complaint "for want of prosecution was within the proper exercise of its discretion" despite the plaintiffs' Constitutionally guaranteed right to due process. App. p. A-1.

The trial court in Westbrook dismissed the plaintiff's complaint with prejudice after the plaintiff's counsel failed to appear for trial. Because a few minutes before trial was to begin the plaintiff's attorney had called the court and told the clerk that he was ill and unable to appear for trial, the court's dismissal order allowed the dismissal to be stricken if, within ten days, the attorney presented sworn testimony from two doctors attesting to his illness and his inability to appear for trial, and paid costs for to the defendant and defense counsel for their appearances for trial. The attorney responded by filing the affidavits of two physicians. The court then scheduled

a hearing on the plaintiff's request to strike the dismissal. After hearing the testimony of the two physicians the court found that the attorney's illness was pretextual and that the real reason for his failure to appear for trial was his aversion to appearing before the particular presiding justice, and denied the plaintiff's motion to strike the dismissal.

On appeal, the Law Court affirmed the dismissal citing this Court's decision in Link v. Wabash Railroad Company, 370 U.S. 626, 8 L.Ed.2d 734, 83 S.Ct. 1386 (1962) for the proposition that that trial court had the inherent power to dismiss the plaintiff's complaint for want of prosecution, but added the following caution:

> [The power to dismiss] should be exercised only with full appreciation and consideration of the plight of the plaintiff. In many cases an innocent plaintiff may be deprived of a valid claim because of the action or inaction of his representative. Although such a result is consistent with principles of agency, it runs counter to the values underlying our system of justice which favors resolution on the merits. . . . In many instances our trial courts would do well to consider, as they have in the past, a lesser sanction than dismissal. Only when conduct . . . seriously threatens the ability of the court to manage its own affairs should dismissal with prejudice be considered. Less serious forms of . . . neglect may be adequately addressed through financial sanctions.

Westbrook, supra. at 689-90.

In Link, this Court, in a 4-3 decision, sustained the dismissal of the oldest case on the trial court's docket after the plaintiff's attorney failed to appear for a pretrial conference because "he was busy preparing papers to file with the [Indiana] Supreme Court," although "he wasn't actually engaged in argument." Link, supra. at 628. The Link case had been on the docket more than

six years and involved years of continuances sought, and other delays caused, by the plaintiff or his attorney. 370 U.S. at 628, n.2. In sustaining the dismissal with prejudice, Justice Harlan, writing for the majority, stated that "this is not a case in which failure to comply with a court order 'was due to inability fostered neither by . . . [petitioner's] own conduct nor by circumstances within its control.'" 370 U.S. at 636. Justice Black, joined by Chief Justice Warren, dissented in a separate opinion on the grounds that the earlier delays could not be made the basis of the dismissal and that the dismissal unjustly punished the plaintiff for his attorney's conduct. 370 U.S. at 636, et seq. Justice Douglas dissented without opinion.

The present case is readily distinguishable from both the Link and Westbrook cases in that the plaintiffs' attorney was present and ready to proceed except that the plaintiffs' two witnesses, including one of the plaintiffs who was an essential witness, were unable to be present through no fault of the plaintiffs due to circumstances beyond their control.

A century ago, in deciding to reverse in a case in which the trial court, as a sanction for the defendant's failure to deposit with the court a sum of money, struck his answer and thereby precluded his raising any defense, this Court said:

> The fundamental conception of a court of justice is condemnation only after a hearing. To say that courts have inherent power to deny all right to defend an action and render decrees without any hearing whatsoever, is in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

Hovey v. Elliott, 167 U.S. 409, 413-14, 42 L.Ed. 215,

17 S.Ct. 841 (1897).

Although the Hovey holding may have been modified somewhat since then, its essence remain intact, and as a general rule parties may not be penalized by dismissal or default judgment for noncompliance when that noncompliance is due to their inability to comply as opposed to willfulness, bad faith or other fault. See e.g. Societe Internationales Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212, 2 L.Ed.2d 1255, 78 S.Ct. 1087 (1958), in which this Court held that because the plaintiff's noncompliance with a discovery order was due to its inability to comply rather than to bad faith, striking the complaint for noncompliance despite good faith efforts to comply violated the plaintiff's right to due process under the Fifth Amendment. 357 U.S. at 210. The due process clause of the Fourteenth Amendment grants to a party opportunity to present his case and have its merits fairly judged. Logan v. Zimmerman Brush Co., 455 U.S. 422, 433, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1981). Fourteenth Amendment due process requires an opportunity, granted at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case. 455 U.S. at 437.

To the extent that the decisions in these cases may be deemed dispositive of the questions raised in this petition, the Law Court's decision in the case below is in conflict with them and, at the very least, is inconsistent with the fundamental right to due process for which they stand. In the alternative, any limitations on the fundamental right to due process under the Fourteenth Amendment should be settled by this Court.

Moreover, the United States Court of Appeals in virtually every circuit has held and continues to hold, as a general rule, that the unavoidable and involuntary absence of a party, a party's attorney, or an essential witness whose appearance can be had at reasonable future

time is sufficient grounds for a continuance and that, absent a clear history of delay or contumacious conduct, the inability of a party, a party's attorney or an essential witness is not sufficient grounds for dismissal or default judgment.

In numerous cases dismissals because a party, a party's attorney or an essential witness was too ill to travel or otherwise appear for trial, the United States Court of Appeals has held that dismissal was an abuse of discretion. See e.g. Harrah v. Morgenthau, 89 F.2d 863 (D.C. Cir. 1937). See also: Gaspar v. Kassem, 493 F.2d 964 (3rd Cir. 1974)(it is an abuse of discretion to deny continuance and new trial when defendant is in Syria and unable to return for trial due to illness); Latham v. Crofters, Inc., 492 F.2d 913 (4th Cir. 1974)(abuse of discretion to deny motions for continuance and for new trial when president of defendant corporation, who was an essential witness, was unable to appear at trial due to a very severe heart attack); Scarver v. Allen, 457 F.2d 308 (7th Cir. 1972)(dismissal is too harsh and an abuse of discretion when plaintiff was unable to appear at trial due to asthma resulting from fire in her apartment); Jarva V. U.S., 280 F.2d 892 (9th Cir. 1960)(inability of plaintiff, due to illness, to appear for trial during four month period is sufficient excuse for lack of prosecution); and Davis v. Operation Amigo, Inc., 378 F.2d 101 (10th Cir. 1967)(illness of litigant severe enough to prevent him from appearing for trial is always a legitimate ground for seeking a continuance and dismissal is too harsh and an abuse of discretion).

It has been held, also, that it is an abuse of the court's discretion to deny the plaintiff's motion to continue and to dismiss his complaint when the plaintiff's essential witness was out of the country and the plaintiff was unable to obtain his return in time for trial. Grochal v. Aeration Processes, Inc., 797 F.2d 1093, 1094-97 (D.C.

Cir. 1986). See also: Richman v. General Motors Corporation, 437 F.2d 196 (1st Cir. 1971)(when plaintiff's expert witnesses were unavailable for scheduled trial, dismissal was too harsh and an abuse of discretion).

The Court of Appeals in the Ninth Circuit has held that the denial of a continuance to obtain the testimony at trial of an essential expert witness was an abuse of discretion and denied the moving party a fair trial after the trial court had told the party's attorney that the court would work out the scheduling problem with the missing expert witness. Fenner v. Dependable Trucking Co., Inc., 716 F.2d 598 (9th Cir. 1983). See also: Leong v. Railroad Transfer Services, Inc., 302 F.2d 555 (7th Cir. 1962)(denial of motion to vacate dismissal of plaintiff's complaint after attorneys for both sides failed to appear for trial because they both had expected a call from the clerk telling them what time trial was to begin and the trial court refused to listen to the attorneys' explanations held to be an abuse of discretion); and Red Warrior Coal & Mining Co., Inc. v. Boron, 194 F.2d 578 (3rd Cir. 1952) (because plaintiff's complaint was dismissed when its expert witness was not available for trial due short notice and air travel complications, despite its attorney's reasonable reliance upon the statement of the clerk who administered the trial list that the case would not be called until a date ten or so days after it was called, the dismissal was held to be too harsh and reversed).

In another case involving travel complications, the dismissal of the plaintiff's case after she failed to appear for trial because she didn't have, and was unable to raise, the funds necessary to travel to Washington, D.C. for trial, was held to be an abuse of discretion. Trakas v. Quality Brands, Inc., 759 F.2d 185 (D.C. Cir. 1985).

Generally, dismissal for want of prosecution requires a clear record of delay or willful contempt and a finding that lesser sanctions would not suffice. See e.g. Carter v. U.S., 780 F.2d 925 (11th Cir. 1986), in which the dismissal

was vacated because the trial court failed to consider lesser sanctions and didn't articulate an adequate basis to justify dismissal.

In the present case, the plaintiffs and their attorney relied to their detriment on the July 27, 1995 pronouncement of the court and subsequent communication with personnel in the clerk's office regarding trial scheduling which would have afforded them about five weeks notice of trial. Such reliance was reasonable. See Red Warrior Coal, supra. Instead of five weeks notice, the plaintiffs' attorney had no more than five days and the plaintiffs had no more than three days notice of trial. Because of the very short notice, the plaintiffs were unable to obtain the attendance of an important witness who then resided in London, and the demands of Plaintiff Stanley's official duties as United States Trustee for Region 17 severely complicated her ability to travel to Portland for trial. The plaintiffs could have gone forward, although at a disadvantage, without one of their witnesses but not without both of them. Plaintiff Stanley made an extraordinary effort to appear for trial but, due to circumstances beyond her control, she was unable to do so.

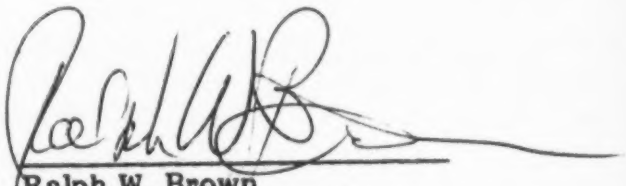
Even in cases of negligent and inexcuseable behavior, dismissals have been vacated as too harsh and abuses of discretion. See e.g. Adams v. Trustees, N.J. Brewery Trust Fund, 29 F.3d 863 (3rd Cir. 1994); Velazquez-Rivera v. Sea-Land Service, Inc., 920 F.2d 1072 (1st Cir. 1990); Lowe v. City of East Chicago, Indiana, 897 F.2d 272 (7th Cir. 1990); and Moore v. St. Louis Music Supply Co., Inc., 539 F.2d 1191 (8th Cir. 1976).

Various state courts of last resort have also vacated such dismissals. See e.g. Hyser v. Hyser, 124 P. 346 (Colo. 1912); Webb v. Carpenter, 148 SE 80 (Ga. 1929); Ritchey v. Pendley, 75 SE 841 (Ga. 1912); Storer v. Heitfeld, 105 P. 55 (Idaho 1909); and McCutcheon's Administrators v. Dean, 54 SW2d 926 (Ky. 1932).

For all the foregoing reasons, the petitions

respectfully pray that the Court issue a writ of certiorari to review the decision of the Maine Supreme Judicial Court.

Dated: April 22, 1997



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MAINE SUPREME JUDICIAL COURT
Reporter of Decisions
Decision No. 7894
Law Docket No. CUM-96-263

LINDA E. STANLEY
v.
JOHN M. BOLES

Submitted on Briefs December 20, 1996
Decided December 31, 1996

Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, RUDMAN, and DANA, JJ.

MEMORANDUM OF DECISION

Linda A. Stanley [sic] appeals from an order of the Superior Court (Cumberland County, Brennan, J.) dismissing with prejudice her complaint against John M. Boles for want of prosecution. Contrary to Stanley's contention, the court's decision to dismiss for want of prosecution was within the proper exercise of its discretion. See Westbrook v. Wallace, 478 A.2d 687, 689 (Me. 1984).

The entry is:

Judgment affirmed.

All concurring.

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
Civil Action
Docket No. CV-92-1380

LINDA E. STANLEY, et al.,)
)
Plaintiffs)
)
v.) ORDER
)
JOHN M. BOLES,)
)
Defendant)

Upon the plaintiffs' motion to vacate the Court's Order of February 2, 1996 dismissing their complaint for failure to prosecute, and to restore this action to the docket for trial, without hearing,

It is ORDERED that the plaintiffs' motion be, and is hereby, DENIED.

Dated at Portland, Maine ___ day of _____, 1996.

3/19/96

/s/ G. Arthur Brennan
G. Arthur Brennan, Justice
Maine Superior Court

STATE OF MAINE

CUMBERLAND, SS.

SUPERIOR COURT
Civil Action
Docket No. CV-92-1380

LINDA E. STANLEY, et al.,

Plaintiffs

v.

JOHN M. BOLES,

Defendant

ORDER

On January 31, 1996 this case was called for non-jury trial. Plaintiffs' counsel was present. Plaintiff was not present. Both the defendant and his counsel were present. When the case was called, plaintiffs' counsel indicated he could not proceed without his client and provided me with a detailed account concerning her absence. Defendant's counsel, likewise, provided a detailed account of the procedural history of this case. Following these presentations, and for reasons stated on the record, I indicated that I would enter an order dismissing this action with prejudice for failure to prosecute.

The entry will be as follows:

The plaintiffs' complaint is ordered dismissed with prejudice for failure to prosecute.

The Clerk may incorporate this order on the docket by reference.

DATED: February 2, 1996

/s/ G. Arthur Brennan
G. Arthur Brennan
Justice, Superior Court

STATE OF MAINE
YORK [sic] COUNTY, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CUM-96-263

LINDA E. STANLEY, ET AL.
Plaintiff

VS.

JOHN M. BOLES, ET AL,
Defendant

NON-JURY PROCEEDINGS

[EXCERPT, pp. 1, 10-15]

BEFORE:

HONORABLE G. ARTHUR BRENNAN,
JUSTICE PRESIDING

CUMBERLAND COUNTY COURTHOUSE
PORTLAND, MAINE

JANUARY 31, 1996

APPEARANCES:

RALPH W. BROWN, ESQ.
ATTORNEY FOR THE PLAINTIFF

DAVID P. SILK, ESQ. ATTORNEY FOR THE DEFENDANT

Donald W. Mitchell, RPR, CSR
Official Court Reporter

[EXCERPT from Page 1]

JANUARY 31, 1996

(WHEREUPON THE FOLLOWING PROCEEDINGS COMMENCED AT 9:17 a.m.)

COURT: Good morning, ladies and gentlemen. Please be seated.

MR. SILK: Thank you, your Honor.

MR. BROWN: Thank you.

COURT: Okay. This is civil case. Matter of Linda Stanley and others versus John Boles. Docket No. CV-92-1380. As I understand things Miss Stanley is not present. Mr. Boles is present. Counsel for Miss Stanley, Mr. Brown is present and Mr. Boles counsel, Mr. Silk is present.

Matter's set for hearing on the merits. Jury waived trial on the merits this morning. Mr. Brown, perhaps I should let you state your position to start with.

* * *

[EXCERPT from Page 10 through Page 15]

COURT: Thank you, Mr. Silk. Whatever happened in the pre-trial stage is, there are motions. There are orders. There is pending unresolved motions to dismiss. That is all a matter of record and so forth. The only thing I want to comment on the history of this particular trial list, which is mailed sometime in early December. It's a trial docket. I can probably take judicial notice of the difficulties of practicing bar on trial dockets. I never go to a lunch bar meeting where the main topic of conversation and criticism, constructive and otherwise of the practicing bar is, trailing dockets. But that's the system we live with through the State of Maine, certainly throughout the southern part of the State of Maine. I can't say that I specifically remember saying one way or the other people that this case would get a special assignment. Special assignment doesn't have quite the meaning in Portland as it used to. A special assignment in terms of art as I inderstand it indicating that a case will be assigned to a particular judge ans as distinguished from whoever happens to be here.

In Portland all cases when they come in and all cases two years ago in September were assigned to a particular

judge. That's me. I certainly have given the fact that both parties were not Maine residents. I certainly don't deny saying we will give you some special attention in terms of when we schedule it. But as I said I don't know, I'm not disagreeing with what Ralph said. I just don't have any memory of it. I would certainly take, I would take into consideration travel schedules when the list came out. I put my jury and non-jury matters together on one list because I find that it is, it is a a good way to move cases along. We had scheduled a jury trial that I anticipated would take most of this week beginning January 29th. We backed that up with both jury and non-jury matters.

My understanding counsel were notified of the backup status of this case on Thursday, which would have been the 25th of January. On Monday morning the case that was set for jury trial settled right before jury selection. I invited counsel over at 1 o'clock in the afrternoon. Mr. Brown and Mr. Silk were kind enough to come over. I said, "We've got this case." "I really got the rest of the week." Ralph Brown explained to me that his client, whom I understand to be a San Francisco native, was going

to be in Washington in any event this week.

I understand from Mr. Silk that his client was a resident of Virginia. There's a letter indicating Mr. Silk would like at least 48 hours advance notice so the travel arrangements can be made. Sat down with people and said "I want to do this case this week." I said, "Ralph, your client's in Washington." "That's a lot closer than San Fransisco." And I think I basically said, "Ralph, you contact your client and tell me when she wants to be here for trial."

Ralph went back. Contacted his client. And as I understand advised the clerk that he wanted to try the case on Wednesday morning. We set the case for Wednesday morning. I is somewhat ironic I think thar if I understand things Mr. Boles flew up from Dulles, the same airport, last night to get here, as I understand Miss Stanley was attempting to do. So I acknowledge because of the trial docket and I acknowledge it's not, cases are better decided on the merits than they are based upon default. On the other hand, within the constraints of the trial docket, I think I have been fair in terms of trying to accommodate everybody's schedule. I didn't say be

here at 1 o'clock on Monday afternoon. Be here on Tuesday afternoon.

What I said was contact Miss Stanley and ask her when this week it would be most convenient. I understand this is a case that might take a half day to a day to try. Let her tell us when it will be convenient for her this week to try the matter. She picked today. She's not here. And I guess under these — Mr. Boles is. And it was an inconvenience for him to be here. And I understand it the notice in terms of, we did not, the Court did not get the notice in terms of these difficulties until after the close of business last night. And Mr. Silk didn't get the notice in time to avert Mr. Boles' trip.

Under those circumstances it seems to me all I can reasonably do to be fair to both parties is call the case for trial and if Mr. Brown is able to proceed he's able to proceed. And I feel sorry about that but I really think that I have been reasonable in trying to accommodate everybody's schedule. And as I say whatever the past difficulties have been here, thay have been dealt with my orders and so forth. Nothing that I am doing here is based on past difficulty. It's based on this case getting

called for trial in a chronological fashion that we all discussed. So you're on, Ralph.

MR. BROWN: Your Honor, my client is not here and I am unable to proceed.

COURT: All right. Case is going to be, Plaintiffs' case will be defaulted and I'll enter an order dismissing the case with prejudice on failure to prosecute. I don't know, what I know from representations from Ralph which I accept that his client intended to get here but travel conplications prohibited it. Under those circumstances I'm not going to impose costs without the opportunity for hearing. I'm not going to. If you feel strongly about that, David, you want to mark that up, I mean if it was a determination that Miss Stanley did not make a good faith effort to get here and be here after notifying Mr. Brown of that, that's one thing. On the other hand, if it's a genuine travel difficulty that precluded her appearance here it seems to me that's something else again. So in the absence of Miss Stanley being here and me being able to make, you know, face-to-face determination about essentially good faith, bad faith kinds of things, I would be reluctant to impose costs. I'm not

reluctant to simply dismiss the case with prejudice for want of prosecution. If you want to follow that up, that's a choice for you to make.

MR. SILK: I doubt she will be here in Maine where I can ascertain the information but I hear what you're saying and I'll discuss that with my client and if my client wants to pursue that I understand you . . .

COURT: I'm not precluding it. I'm just saying I'm not prepared to enter that kind of order today based on what I know about Miss Stanley's difficulties.

MR. SILK: Thank you.

COURT: Okay. Thank you very much, folks.

(WHEREUPON THE HEARING WAS RECESSED AT 9:40 a.m.)

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting at the Law Court

Law Docket No. Cum-96-263
Decision No. 7894

LINDA A. STANLEY Plaintiff/Appellant	)	
v.	)	ORDER
JOHN M. BOLES, Defendant/Appellee	)	

Upon the motion of Appellant for reconsideration, it is ORDERED that the motion be, and it hereby is DENIED.

The mandate shall issue forthwith.

Dated: January 22, 1997

For the Court

/s/ David E. Roberts
Justice, Supreme Judicial Court

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
Civil Action
Docket No. CV-92-1380

LINDA E. STANLEY, et al.,)
Plaintiffs)
v.)
JOHN M. BOLES,)
Defendant)

MOTION TO CONTINUE TRIAL

COME NOW the plaintiffs, by and though counsel, and respectfully move this Honorable Court for an order continuing the trial in this action to a time when it can be scheduled at the beginning of a trial list so as to afford the parties five (5) or so weeks notice, on the grounds that: (1) on July 27, 1995 Justice Brennan, in conjunction with a hearing plaintiffs' motion to amend and defendant's most recent motion to dismiss and in the course of a discussion about trial scheduling and the prospect of a motion for special assignment, informed the parties that the case would be place first on a trial list to begin on a Monday so as to afford five (5) or so weeks notice of trial, and that that was as close to a special assignment as we will get; (2) the undersigned attorney for the plaintiffs has been unable to reach Plaintiff Linda E. Stanley, who is an essential witness for the plaintiffs, to inform her of the prospect of trial; (3) Mark Reiff, who is the other of the plaintiffs' witnesses, is presently living in Great Britain and cannot be present on such short notice; and (4) the undersigned attorney for the plaintiffs presently is scheduled to appear Monday before Justice Cole in a criminal matter and in the District Court on an unrelated civil matter. In support of their motion, the plaintiffs respectfully represent the following:

1. On July 27, 1995, Justice Brennan held a hearing on the plaintiffs' motion to amend the complaint and the defendant's most recent motion to dismiss. In conjunction with that hearing, the Court and counsel discussed trial scheduling in this case. When the undersigned attorney stated that the plaintiffs intended to file a

motion for special assignment because the obligations and duties of Plaintiff Linda E. Stanley as the United States Trustee for Region 17 covering Northern California and all of Nevada, and the presence of one of the plaintiffs' witnesses in Great Britain, necessitated substantial advance notice of trial to clear their schedules and make travel arrangements, Justice Brennan informed the parties that the case would be placed first on a trial list to begin on a Monday, that that should afford five (5) or so weeks advance notice of trial, and that that was as close to a special assignment as the parties would get.

2. Since the present trial list was published, the undersigned attorney for the plaintiffs on at least one occasion has spoken with personnel in the Clerk's office about the scheduling of this case and understood that case would not be called.

3. On the morning of Friday, January 26, 1996, the undersigned attorney for the plaintiffs retrieved a message from the Clerk's office indicating that the case was now the number two back-up case for Monday, January 29,1996.

4. The plaintiffs have two witnesses, Plaintiff Linda E. Stanley and Mark Reiff, Esquire.

Linda E. Stanley is employed by the United States Department of Justice as the United States Trustee for Region 17 covering Northern California and all of Neveda. Her official duties and obligations require her to travel frequently throughout Region 17 and other places throughout the United States in connection with her employment.

Mark Reiff presently resides in Great Britain, is difficult to reach by phone, and requires reasonable advance notice to make travel arrangements and for the forwarding of funds to pay for such travel.

5. Early this afternoon (morning in San Francisco), the undersigned attorney for the plaintiffs telephoned the office of Plaintiff Linda E. Stanley in San Francisco, was informed that she was in the field in

Nevada and would not return to San Francisco until Monday, January 29, 1996 at the earliest, and left message for her on her E-mail. It appears unlikely that the undersigned attorney will be able to reach Plaintiff Linda E. Stanley before Monday.

6. The undersigned attorney for the plaintiffs is presently scheduled to appear before Justice Cole at 8:30 o'clock A.M. in a criminal matter encaptioned State of Maine v. Anthony W. Worrey, and is scheduled to appear in the District Court at 9:00 o'clock A.M. on a civil matter encaptioned Francis X. Picher v. Carson's Family Restaurant, Inc. The undersigned attorney does not know how much time will be required by these other matters, but anticipates being tied up for most of the morning.

MEMORANDUM

The primary purpose of the procedural rules is to promote the ends of justice. Rule 1, Maine Rules of Civil Procedure. See: Wright & Miller, Federal Practice & Procedure, Civil 2d, §1029 (1987). See also: General Mill Supply Co. v. S.C.A. Services, Inc., 697 F.2d 704, 711 (6th Cir. 1982); Samuels v. Health & Hospitals Corp. of the City of New York, 591 F.2d 195 (2d Cir. 1979); Caracci v. Brother International Sewing Machine Corp., 222 F.Supp. 769, affirmed 341 F.2d 377 (5th Cir. 1965); Fisher v. McGowan, 585 F.Supp. 978 (D.R.I. 1984); Polaroid Corp. v. Casselman, 213 F.Supp. 379, 381 (D.N.Y. 1962).

The plaintiff should be able to rely on the Court's July 27, 1995 statement with regarding the scheduling of trial. The truth cannot be found nor can justice be done without a fair trial. A fair trial requires the presence and participation of the plaintiffs' witnesses, both of whom are located well outside the State of Maine and require reasonable advance notice to travel to Portland for trial.

WHEREFORE, the plaintiffs pray that trial in this action be continued until it can be scheduled for trial in accordance with the Court's prior instruction.

Dated at Portland, Maine this twenty-sixth day of January, 1996.

/s/ Ralph W. Brown
Ralph W. Brown
Attorney for Plaintiffs
19 Candlewyck Road
Portland, Maine 04102
(207) 773-3133

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
Civil Action
Docket No. CV-92-1380

LINDA E. STANLEY, et al.,

Plaintiffs

v.

JOHN M. BOLES,

Defendant

MOTION TO VACATE ORDER, AND FOR NEW TRIAL WITH INCORPORATED MEMORANDUM

COME NOW the plaintiffs, by and through counsel, pursuant to Rule 59 of the Maine Rules of Civil Procedure, and respectfully move this Honorable Court for an order vacating its February 2, 1996 Order by which the plaintiffs' complaint was dismissed for failure to prosecute because Plaintiff Linda E. Stanley was unable to appear for trial, and restoring this action to the docket for a new trial, and the grounds that, given the minimal notice of trial, Plaintiff Linda E. Stanley despite her best efforts and due to circumstances beyond her control was unable to appear for trial. The plaintiffs' motion is supported by the affidavits of Linda E. Stanley and Ralph W. Brown.

MEMORANDUM

1. As shown in the accompanying Affidavit of Ralph W. Brown, the Court had informed counsel on July 27, 1995 that the case would be placed first on a trial list to begin on a Monday, that that would afford the parties five or so weeks' advance notice of trial, and that that was as close to a special assignment as the parties would get. The plaintiffs justifiably relied on the Court's statement. The case, nevertheless, was included on the trial list beginning in January. The plaintiffs' attorney had at least

one conversation with personnel in the Clerk's office as a result of which he understood that the case would not be called. At the same time, the plaintiffs' attorney necessarily was attending to a very demanding and time consuming bankruptcy matter, and was struggling to keep up with the other matters in which he was engaged.

As detailed in the affidavits accompanying this motion, when it appeared that the case would be called notwithstanding the plaintiffs' understanding that they would have five or so weeks' notice, Plaintiff Linda E. Stanley made a diligent effort to be present for trial. Through no fault of hers, she was unable to be present on the day the case was actually called for trial.

2. While there have been procedural problem with this case, the plaintiffs have already paid for their shortcomings. The balance of the defendant's alleged procedural problems are grossly exagerated. The defendant has uniformly responded to what he characterized as failures to comply with court orders with successive motions to dismiss despite the fact that the plaintiffs have consistently acted in good faith. Whenever, for example, a discovery dispute arose, rather than address the issues in the context of the relevant discovery motion(s), the defendant filed another motion to dismiss. Each time the defendant subsequently found an excuse to file yet another motion to dismiss, the defendant reiterated his ever longer and selfserving list of motions to dismiss.

3. The Law Court has repeatedly said that the decisions of the federal courts construing the federal rules upon which the Maine rules are modeled are entitled to great weight. Westman v. Armitage, 215 A.2d 919, 921 (Me. 1966); Kittery Electric Light Co. v. Kittery, 219 A.2d 744, 747 (Me. 1966); Wormelle v. George, 325 A.2d 4, n. 3 (Me. 1974); and Allen [v.] Cole Realty, Inc., 325 A.2d

19 (Me. 1974). See also: State v. Wedge, 322 A.2d 328 (Me. 1974).

The primary purpose of the procedural rules is to promote the ends of justice. Rule 1, Maine Rules of Civil Procedure. See: Wright & Miller, Federal Practice & Procedure, Civil 2d, §1029 (1987). See also: General Mill Supply Co. v. S.C.A. Services, Inc., 697 F.2d 704, 711 (6th Cir. 1982); Samuels v. Health & Hospitals Corp. of the City of New York, 591 F.2d 195 (2d Cir. 1979); Caracci v. Brother International Sewing Machine Corp., 222 F.Supp. 769, affirmed 341 F.2d 377 (5th Cir. 1965); Fisher v. McGowan, 585 F.Supp. 978 (D.R.I. 1984); and Polaroid Corp. v. Casselman, 213 F.Supp. 379, 381 (D.N.Y. 1962).

> Rule 1 therefore requires that rules of procedure are to be applied in a fashion that will promote the ends of justice. ... The force of the first and greatest of the federal rules is felt in all of the remaining rules, and the spirit with which they have been applied by the federal courts for more than thirty years confirms this impression. Thayer v. Liggett & Meyers Tobacco Co., (W.D. Mich., Feb. 9, 1970, Civ. A. No. 5314).

"Dismissals not going to the merits ... are viewed with disfavor in the federal courts." David v. Sinclair Refining Co., 25 F.R.D. 190, 191 (D.N.Y. 1960). "To fall back on a technicality and refuse to permit a case to come to issue on the merits is to sap the very heart out of the rules and to obviate the very purpose for which they are intended." DeFranco v. United States, 18 F.R.D. 156, 159 (D.Cal. 1955). See also: Foman v. Davis, 371 U.S. 178, 181 L.Ed.2d 222, 83 S.Ct. 227, 230 (1962).

4. Regardless of any previous procedural inadequacies, the action had come to the point of trial. The plaintiffs had been told that they would have about five weeks advance notice of trial. The notice actually afforded the plaintiffs, depending on where you start the clock, was five days at most. Plaintiff Linda E. Stanley made an extraordinary effort to come to Portland for trial. Her efforts in that regard far surpassed mere good faith, but were thwarted by circumstances beyond her control. In the absence of bad faith, such quirks of fate should not form the basis for the dismissal of the plaintiffs' meritorious claim against the defendant.

CONCLUSION

For all the foregoing reasons, the plaintiffs pray that the Court enter an order vacating its Order of February 2, 1996 and restoring this action to the docket for trial.

Dated at Portland, Maine this twelfth day of February, 1996.

/s/ Ralph W. Brown
Ralph W. Brown
Attorney for Plaintiffs
19 Candlewyck Road
Portland, Maine 04102
(207) 773-3133

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
Civil Action
Docket No. CV-92-1380

LINDA E. STANLEY, et al.,)
Plaintiffs)
)
v.)
)
JOHN M. BOLES)
Defendant)

AFFIDAVIT OF RALPH W. BROWN

I, Ralph W. Brown, being first duly sworn, hereby depose and say that:

1. I am an attorney at law duly admitted to practice in and before the courts of the State of Maine with an office in the City of Portland, County of Cumberland and State of Maine.

2. I am the attorney of record for the plaintiffs in this action, and make this affidavit based upon my personal knowledge.

3. On July 27, 1995, the attorney for the defendant and I appeared before Justice Brennan for a hearing on the plaintiffs' motion to amend the complaint and the defendant's most recent motion to dismiss. In conjunction with that hearing, the Court and counsel discussed trial scheduling in this case. When the undersigned attorney stated that the plaintiffs intended to file a motion for special assignment because the obligations and duties of Plaintiff Linda E. Stanley as the United States Trustee for Region 17 covering northern and eastern California and all of Nevada, and the presence of one of the plaintiffs' witnesses in Great Britain, necessitated substantial advance notice of trial to clear their schedules and make travel arrangements, Justice Brennan informed us that the case would be placed first on a trial list to begin on a Monday, that that should afford the parties five or so weeks advance notice of trial, and that that was as close to a special assignment as we would get.

4. On November 16, 1995, acting on behalf of other clients, I filed in the United States Bankruptcy Court for the District of Maine, a voluntary petition for relief under Chapter 13. The Chapter 13 case involved the liquidation of a corporation and the transfer of its business operations, a restaurant, and assets to its principal shareholder who is one of the joint debtors in that case. The restaurant employees a few more than thirty people. The debtors have over $400,000.00 in secured debt and about $230,000.00 in unsecured debt. The case involves several significant legal issues with respect to which the law is uncertain and some of which issues are already being litigated in the context of a motion for relief from stay filed by one of the debtors' secured creditors. The debtors' plan hinges in part on their obtaining new credit to expand the dining room and provide additional operating capital to get the business through the present off season. The debtors' personal and business cash flow presently is extremely tight and precarious. In early December, 1995, one of the debtors' unsecured creditors, despite actual knowledge of the transfer of its operations and assets in exchange for the assumption of its obligations and actual knowledge of the debtors' subsequent bankruptcy, filed a state court collection action against the liquidated corporation. Later that month, the creditor obtained an ex parte attachment and, on January 2, 1996, attached on trustee process $7,300.00 of the debtors' business funds which were on deposit in a formerly corporate account. The attachment created an immediate and severe financial crisis for the debtors and jeopardized their business and their Chapter 13 case. In addition to defending the action against the liquidated corporation, it was necessary to intervene on behalf of the debtor in the action against the corporation and commence an adversary proceeding in the Bankruptcy Court in an ongoing effort to recover the debtors' urgently needed funds. The debtors' case and the related state court actions have demanded constant attention and consumed the vast majority of my time.

5. After the trial list was published, I has a telephone conversation with personnel in the Clerk's office about the trial scheduling of this and another case on the same trial list. During the course of that conversation I reiterated the substance of Justice Brennan's instruction of July 27, 1995 and understood that the case would not

be called. Due to the press of other urgent business and relying upon my understanding from the Clerk that the case would not be called, I filed neither a motion to continue nor a letter request for protection.

6. On the morning of January 26, 1996, I retrieved from my answering machine a message from the Clerk's office which had apparently been left the previous afternoon indicating that the case was now the number two back-up case for Monday, January 29, 1996.

7. That afternoon, I called the San Francisco office of Plaintiff Linda E. Stanley, was informed that she was in the field in Nevada and would not return to San Francisco until Monday, January 29, 1996 at the earliest, and left a message for her stating among other things that the case was likely to be called for trial the following week and that we needed to talk as soon as possible. Having been unable to reach my client and principal witness, I prepared and filed a motion to continue trial.

8. On Sunday evening, January 28, 1996, I received a telephone called from Linda E. Stanley, who informed me that she was scheduled to fly to Washington on Tuesday and, because of several other previously scheduled commitments, did not expect to be available for trial before February 21, 1996.

9. On the afternoon of Monday, January 29, 1996, opposing counsel and I met with Justice Brennan in chambers, at which time I informed the Court of my client's scheduling and travel problems. At that time we were informed that the Court would be available to try the case any time that week and that the Court was not inclined to continue the case, and instructed to work toward a trial later that week. Later that day I spoke with Linda E. Stanley by telephone and informed her that the case had been reached for trial, that Justice Brennan had indicated that he was not inclined to continue the case, and that he would be available to try the case any day that week. She told me she would do what she could to appear in Portland for trial that week.

10. On Tuesday, January 30, 1996, I received a telephone call from Linda E. Stanley who informed me that she was at the airport in San Francisco about to fly to Washington, she said there was an early evening flight from Washington to Portland which would enable her to be in Portland for trial on Wednesday morning at 9:00 o'clock. I then informed both the Clerk's office and opposing counsel that she had found a flight which would bring her to Portland for trial Wednesday morning.

11. At about 5:00 o'clock p.m. on Tuesday, January 30, 1996, I received another call from Linda Stanley during which she told me that she was in Washington but that she had been unable to get a plane for Portland and was looking for alternative arrangements. I immediately called opposing counsel and informed him of the problem. He in turn informed me that his client was already en route Portland from Virginia. I later received another telephone call from Linda E. Stanley during which she told me she had been unable to make other arrangements to travel to Portland for trial on Wednesday, but had been able to reschedule her meetings, etc., so that she could fly to Portland for trial on Thursday.

12. In addition to Linda E. Stanley, the plaintiffs have one other witness, Mark R. Reiff, Esquire. The billing statement which the plaintiffs would have offered in evidence indicate that Mr. Reiff performed the overwhelming majority of the work done for the plaintiffs. Mr. Reiff, however, presently resides in London, England. Given the relatively short notice of trial, it was not possible to contact Mr. Reiff and arrange for his travel to Portland for trial the week of January 29, 1996.

13. Although the plaintiffs have a meritorious claim against the defendant for something in excess of $21,000.00, I could not proceed with trial without at least one of the plaintiffs' principal witnesses.

14. On Wednesday, January 31, 1995, opposing counsel and I again met with Justice Brennan at which time I explained that Linda E. Stanley had been unable to travel to Portland, but that she had rearranged her schedule and was able to fly to Portland for trial the

next day. We moved to the courtroom where I reiterated the circumstances surrounding my client's absence. The case subsequently was called for trial and, in view of my inability to proceed without my client, the plaintiffs' complaint was dismissed for failure to prosecute. The Court issued a written order to that effect on Friday, February 2, 1996.

Further, your deponent saith not.

Dated at Portland, Maine this twelfth day of February, 1996.

/s/ Ralph W. Brown
Ralph W. Brown

STATE OF MAINE
CUMBERLAND, SS..

February 12, 1996

Then personally appeared before me the above-named Ralph W. Brown, a person known to me, who subscribed the foregoing affidavit and made oath that the matters contained therein were true.

/s/ Francis M. Jackson
Francis M. Jackson
Attorney at Law

STATE OF MAINE
CUMBERLAND, SS

SUPERIOR COURT
Civil Action
Docket No. CV-92-1380

LINDA E. STANLEY, et al.,)
)
Plaintiffs)
)
v.)
)
JOHN M. BOLES,)
)
Defendant)

AFFIDAVIT OF LINDA E. STANLEY

I, Linda E. Stanley, being first duly sworn, hereby depose and say that:

1. I am a member of the bar and a resident of the State of California and make this affidavit based upon my personal knowledge.

2. I am a plaintiff in this action and the former managing partner and now the partner in charge of the dissolved law partnership, Taylor & Stanley, which was a San Francisco law firm. The subject of the litigation is unpaid legal fees for services performed in San Francisco for the defendant John M. Boles (Boles). Boles had been sued by Bank of America on a guaranty. Judgment had been entered against him in excess of $165,000 and his former attorney was suing him as I am now for unpaid legal fees.

3. I give this affidavit to set forth my good faith attempts to appear at a trial of this matter during the week of January 29 through February 2, 1996. The first time I was able to appear and stay for a trial was 11:00 a.m. on Thursday, February 1, 1996, but I was advised by my attorney, Ralph Brown, on Wednesday, January 31, that the court had dismissed my case. There were no plane connections for me to get to Portland by 9:00 a.m. on Wednesday, January 31.

4. I hold a senior government position in the Department of Justice. I have a very heavy meeting and travel schedule. As the United States Trustee for Region 17, I am responsible for the administration of the over 50,000 cases filed in my region which covers the federal districts of Northern and Eastern California and all of Nevada. I have eight offices and 75 employees. In addition, I chair the national committee for administration of Chapter 13 and serve on the national Advisory Committee for the agency.

5. On Friday, January 26, 1996, I flew to Nevada to conduct 17 interviews of staff and job applicants in my Las Vegas office.

6. When I returned to San Francisco in the evening, I picked up a message from my attorney, Ralph Brown, that my case would go to trial the following week if the case preceding it for trial were settled.

7. On Monday, January 29, 1996, I learned from Mr. Brown that the preceding case had settled and my case could be tried that week.

8. The next day, I had been long-scheduled to fly to Washington, D.C. for a round of meetings and a presentation to a board of bankruptcy judges from around the country about the work of my committee. The meetings included meetings with the director of my agency, the deputy director, the general counsel, the Deputy Associate Attorney General of the Department of Justice, and three United States trustees who were also flying to Washington.

9. Knowing and appreciative of the difficulty of trial scheduling for courts, I began the lengthy complicated process of trying to fly to Portland for my trial and at the same time to meet the scheduled obligations of my job.

10. I called U.S. Air on Monday and found that U.S. Air had a "6:30" plane from Dulles to Boston and another plane to Portland arriving at Portland at "9:20."

11. When I arrived at San Francisco Airport on Tuesday morning for my 8:00 a.m. United plane to Washington via Chicago, I called Mr. Brown and told him I was trying to get on a direct United flight

to Washington and a connecting "6:30" flight on U.S. Air to Portland and would be arriving in Portland at 9:20 p.m. and asked if it were possible to start the trial at 9:00 a.m. the next day so I could leave in mid-afternoon to fly back on a direct flight to Washington for appointments I could not reschedule.

12. By standing by, I was able to get on a direct flight to Washington but I was not able to reach U.S. Air.

13. When I arrived at Dulles, I learned that there was no "6:30" connection on U.S. Air for Boston and Portland. The 6:30 plane was a 6:30 a.m. plane not a 6:30 p.m plane. The last flight to Boston for Portland was at 2:00 p.m. It was impossible for me to fly to Portland in a day.

14. I called Mr. Brown and told him I had missed a connection to Portland, but I would again try to reschedule so that I could free up Thursday for the trial.

15. I rescheduled every appointment for Thursday including my presentation to the judges which was rescheduled to early Friday morning. I called Mr. Brown and told him I could fly out of National Airport at 7:00 a.m. and get to Portland for a trial on Thursday starting at 11:00 am. and that I was able to stay late on Thursday because I was able to change the beginning time of my presentation to the judges to Friday morning.

16. I appreciate the problems of scheduling court trial calendar. I apologize to the court for my inability to get to court in Portland by 9:00 a.m. on Wednesday, January 31, and I deeply regret the problems the court had in clearing its calendar.

17. The week made available for trial coincided with an extraordinarily busy time for me. I made extraordinary efforts to be available for trial the week of January 29, and I was available but not at the first time I thought I could be.

18. I am a plaintiff in this lawsuit. I have no interest in evasion or delay. I am disturbed that defendant and counsel have seized on

every opportunity to ask for a dismissal relying on logistic difficulties of an out-of-state party living on the other side of the country. Defendant's counsel has focused little on the merits of the case. I was surprised that at my deposition in Portland last spring (May 22, 1995), counsel had not even examined or asked for the delivery of the documents I produced in this case relating to the work and the billings of my former law firm. I shipped these documents to Portland more than a year before my deposition. Counsel looked at them for the first time at my deposition.

19. I deeply apologize to the court. At the same time, I humbly request an opportunity for a trial so that my case can be decided on the merits.

Further, your deponent saith not.

Dated at San Rafael, California this tenth day of February, 1996.

/s/ Linda E.Stanley
Linda E. Stanley

STATE OF CALIFORNIA
MARIN COUNTY

February 10, 1996

Then personally appeared before me the above-named Linda E. Stanley, a person known to be, who subscribed the foregoing affidavit and made oath that the matter contained therein were true.

/s/ Howard Salkin

[NOTARY SEAL]

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
Civil Action
Docket No. CV-92-1380

LINDA E. STANLEY, et al.,)
)
Plaintiffs)
)
v.) NOTICE OF APPEAL
)
JOHN M. BOLES,)
)
Defendant)

COME NOW the plaintiffs, by and through counsel, pursuant to Rule 73(b) of the Maine Rules of Civil Procedure, and hereby give Notice that the plaintiffs, Linda E. Stanley and John F. Taylor, hereby Appeal to the Law Court from the Superior Court's order of February 5, 1996 (entered on the docket in this action on February 5, 1996) dismissing with prejudice the plaintiff's action for failure to prosecute, from its order of March 19, 1996 (entered on the docket in this action on March 21, 1996) denying the plaintiffs' Rule 59 motion to vacate its order of February 5, 1996, and from so much of its interlocutory order of July 28, 1995 (entered on the docket in this action on July 31, 1995) which denied the plaintiffs' motion for leave [to] amend their complaint.

Dated at Portland, Maine this nineteenth day of April, 1996.

/s/ Ralph W. Brown

Ralph W. Brown
Attorney for Plaintiffs
19 Candlewyck Road
Portland, Maine 04102
(207) 773-3133

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
Civil Action
Docket No. CV-92-1380

LINDA E. STANLEY, et al.,)
)
Plaintiffs)
)
v.)
)
JOHN M. BOLES,)
)
Defendant)

AMENDED
NOTICE OF APPEAL

COME NOW the plaintiffs, by and through counsel, pursuant to Rule 73(b) of the Maine Rules of Civil Procedure, and hereby give Notice that the plaintiffs, Linda E. Stanley and John F. Taylor, hereby Appeal to the Law Court from the Superior Court's order of February 2, 1996 (entered on the docket in this action on February 5, 1996) dismissing with prejudice the plaintiff's action for failure to prosecute, from its order of March 19, 1996 (entered on the docket in this action on March 21, 1996) denying the plaintiffs' Rule 59 motion to vacate its order of February 5, 1996, and from so much of its interlocutory order of July 28, 1995 (entered on the docket in this action on July 31, 1995) which denied the plaintiffs' motion for leave amend their complaint.

Dated at Portland, Maine this nineteenth day of April, 1996.

/s/ Ralph W. Brown

Ralph W. Brown
Attorney for Plaintiffs
19 Candlewyck Road
Portland, Maine 04102
(207) 773-3133

STATE OF MAINE
CUMBERLAND, SS.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. CUM-96-263

LINDA E. STANLEY, et al.
Appellants

v.

JOHN M. BOLES
Appellee

ON APPEAL FROM THE SUPERIOR COURT

BRIEF OF APPELLANTS

[Excerpt from Pages 11 through 14]

Ralph W. Brown
Attorney for Appellants
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(207) 773-3133

ARGUMENT

I. THE SUPERIOR COURT DID COMMIT REVERSIBLE ERROR BY DEFAULTING THE PLAINTIFFS AT TRIAL AND DISMISSING THEIR COMPLAINT WITH PREJUDICE BECAUSE PLAINTIFF LINDA E. STANLEY WAS UNABLE TO APPEAR TO TESTIFY, AND BY DENYING THE PLAINTIFFS' MOTION TO VACATE THE ORDER DISMISSING THEIR COMPLAINT WHEN: THE COURT HAD PREVIOUSLY INFORMED THE PARTIES THAT BECAUSE PLAINTIFF LINDA E. STANLEY WAS EMPLOYED IN SAN FRANCISCO, CALIFORNIA AS UNITED STATES TRUSTEE FOR REGION 17, RESIDED IN CALIFORNIA AND WOULD HAVE TO TRAVEL A GREAT DISTANCE TO MAINE FOR TRIAL, AND BECAUSE ONE OF THE PLAINTIFFS' WITNESSES THEN RESIDED IN LONDON, U.K., THE CASE WOULD BE PLACED FIRST ON A TRIAL LIST TO BEGIN ON A MONDAY SO AS TO AFFORD THE PARTIES ABOUT FIVE (5) WEEKS NOTICE OF TRIAL, AND THAT THAT WAS AS CLOSE TO A SPECIAL ASSIGNMENT AS THE PARTIES WOULD GET; THE CASE WAS CALLED FOR TRIAL ON VERY SHORT NOTICE; AND PLAINTIFF LINDA E. STANLEY MADE A DILIGENT EFFORT TO BE PRESENT FOR TRIAL BUT THROUGH NO FAULT OF HER OWN WAS UNABLE TO BE PRESENT THE DAY THE TRIAL WAS TO BEGIN.

The Law Court has repeatedly said that the decisions of the federal courts construing the federal rules upon which the Maine rules are modeled are entitled to great weight. Westman v. Armitage, 215 A.2d 919, 921 (Me. 1966); Kittery Electric Light Co. v. Kittery, 219 A.2d 744, 747 (Me. 1966); Wormelle v. George, 325 A.2d 4, n. 3 (Me. 1974); and Allen v. Cole Realty, Inc., 325 A.2d 19 (Me. 1974). See also: State v. Wedge, 322 A.2d 328 (Me. 1974).

The primary purpose of the procedural rules is to promote the ends of justice. Rule 1, Maine Rules of Civil Procedure. See: Wright & Miller, Federal Practice & Procedure, Civil 2d, §1029 (1987). See also: General Mill Supply Co. v. S.C.A. Services, Inc., 697 F.2d 704, 711 (6th Cir. 1982); Samuels v. Health & Hospitals Corp. of the City of New York, 591 F.2d 195 (2d Cir. 1979); Caracci v. Brother International Sewing Machine Corp., 222 F.Supp. 769 (E.D.La. 1963), affirmed 341 F.2d 377 (5th Cir. 1965); Fisher v. McGowan, 585 F.Supp. 978 (D.R.I. 1984); and Polaroid Corp. v. Casselman, 213 F.Supp. 379 (S.D.N.Y. 1962).

The rules also embody strong policy considerations favoring the resolution of actions on their merits. Traguth v. Zuck, 710 F.2d 90, 94 (2nd Cir. 1983); Meehan v. Snow, 652 F.2d 274, 277 (2nd Cir. 1981); and Smith-Weik Machinery Corp. v. Murdock Machine & Engineering Co., 423 F.2d 842, 844 (5th Cir. 1970). Dismissals with prejudice and defaults "are drastic sanctions, termed 'extreme' by the Supreme Court." Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 863-64 (3rd Cir. 1984). "Dismissals must be a sanction of last, not first, resort." Ibid., at 869. "The decision is committed to the discretion of the . . . court, but '[a]n abuse of discretion need not be glaring to justify reversal.' The narrow scope of the . . . court's discretion stems from 'strong policies favoring the resolution of genuine disputes on the merits,' and for the same reasons, 'doubts are to be resolved in favor of a trial on the merits." Traguth v. Zuck, 710 F.2d, at 94. "The sanction of dismissal is the most severe sanction a court can apply, and its use must be tempered by a careful exercise of judicial discretion." Richman v. General Motors Corp., 437 F.2d 196, 199 (1st Cir. 1971). "The decided cases, while noting that a dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff." Ibid. See: Sheepscot Land Corp. v. Gregory, 383 A.2d 16, 22 (Me. 1978).

In the instant case, the plaintiffs had two witnesses, Plaintiff Linda E. Stanley and a former associate who then lived in London, U.K. (The other plaintiff was too ill and lacked the capacity to travel to Maine, much less meaningfully participate in the trial.) The Court had previously told the parties, for a variety of reasons including the demands of Plaintiff Linda E. Stanley's employment as United States Trustee for Region 17, her residing in California, and the location of one of the plaintiffs' witnesses in London, that the case would be placed at the beginning of a trial list to begin on a Monday so as to afford the parties about five or so weeks advance notice of trial. The Court's representation notwithstanding, the case showed up in the midst of the trial list for January and February of 1996. When the plaintiffs' attorney brought the Court's scheduling representations to the attention of personnel in the Clerk's office, he was led to believe that the case would not be called. The plaintiffs reasonably relied on the representations of both the Court and the personnel in the Clerk's office, and should not be penalized for their reliance. Frenner v. Dependable Trucking Co., Inc., 716 F.2d 598, 602 (9th Cir. 1983).

Despite the statements of the Court and the personnel in the Clerk's office, the case was called for trial on a Thursday as number two back up for the following Monday. The plaintiffs' attorney received the Clerk's message on Friday, and promptly attempted to reach and inform his client, but was unable to contact her until Sunday evening. Despite her numerous prior official commitments in Washington, D.C. for that week, the plaintiff managed to rearrange her schedule and made a diligent, even valiant, effort to fly to Maine. Her efforts far surpassed mere good faith, but were thwarted by circumstances beyond her control. The was no willfulness, no bad faith, and no dilatory or contumacious conduct on the part of the plaintiffs. In the interim, the plaintiffs' counsel had immediately filed a motion to continue trial based upon the plaintiffs' reliance on the prior

representations of the Court and personnel in the Clerk's office, the resultant surprise, and the anticipated unavailability of his client as well as the witness in London. The case ultimately was called for trial without the Court expressly ruling on the motion to continue. Under such circumstances, the Court's not granting the motion to continue trial and its subsequent dismissal of the plaintiffs' complaint for failure to prosecute were an abuse of the Court's discretion. Aghnides v. Marmon Group, Inc., 344 F.Supp. 829, 834-35 (S.D.W.Va. 1972). See: Smith-Weik Machinery Corp. v. Murdock Machine & Engineering Co., 423 F.2d, at 843; Fenner v. Dependable Trucking Co., Inc., 716 F.2d, at 598; Latham v. Crofters, Inc., 492 F.2d 913, 916 (4th Cir. 1974); Gaspar v. Kassm, 493 F.2d 964, 968-69 (3rd Cir. 1974); Royster v. Lederle, 128 F.2d 197, 200 (6th Cir. 1942). The result was severe prejudice to the plaintiffs. Smith-Weik Machinery Corp. v. Murdock Machine & Engineering Co., 423 F.2d, at 844. The Fourteenth Amendment to the United States Constitution requires that the plaintiffs be given a meaningful opportunity to assert their claim(s), and the dismissal of their complaint in this case deprived them of the constitutionally guaranteed right to a fair trial and due process of law. See: Employee Staffing of America, Inc. v. Travelers Insurance Co., 674 A.2d 506, 508 (Me. 1996).

We come now to the plaintiffs' Rule 52 motion to vacate the Court's order dismissing their complaint. The analysis is essentially the same except that in order to justify vacating the dismissal, the plaintiffs must also show a meritorious claim. Davis v. Musler, 713 F.2d 907, 915 (2nd Cir. 1983). A claim will be deemed meritorious if the allegations of the pleadings, if established at trial, would support recovery by the plaintiff. Poulis v. State Farm Fire & Casualty Co., 747 F.2d, at 869-70; United Coin Meter v. Seaboard Coastline Railroad, 705 F.2d 839, 846 (6th Cir. 1983). The plaintiffs' meritorous claim is more than apparent from the complaint, the amended complaint and one of the affidavits of Linda E. Stanley

submitted in support of their motion.

The orderly rules of procedure do not require the sacrifice of the rules of fundamental justice. Davis v. Musler, 713 F.2d, at 917. "To fall back on a technicality and refuse to permit a case to come to trial on the merits is to sap the very heart out of the rules and to obviate the very purpose for which they are intended." DeFranco v. United States, 18 F.R.D. 156, 159 (S.D.Cal. 1955).

STATE OF MAINE
CUMBERLAND SS.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. CUM-96-263

LINDA E. STANLEY, et al.,)
)
Appellants)
)
v.)
)
JOHN M. BOLES,)
)
Appellee)

MOTION FOR REHEARING WITH
INCORPORATED MEMORANDUM

COME NOW, the appellants, Linda E. Stanley and John F. Taylor, by and through counsel, pursuant to the provisions of Rule 76A of the Maine Rules of Civil Procedure, and respectfully move this Honorable Court for rehearing with respect to its decision on the appeal in above-encaptioned matter on the grounds that the Law Court appears to have overlooked or misapprehended the denial of the plaintiffs' constitutionally protected right to due process given the plaintiffs' reasonable reliance on the Court's prior statements regarding trial scheduling and the trial Court's subsequent dismissal of the plaintiffs' complaint as a consequence of Plaintiff Linda E. Stanley's proper performance of her official duties as a senior official of the United States Department of Justice and other circumstances beyond her control which precluded her from being present for trial despite her valiant efforts to attend and testify. This motion is supported by the previously filed affidavits of Linda E. Stanley and Ralph W. Brown dated February 10, 1996 and February 12, 1996 respectively, a true copy each of which is appended hereto and incorporated herein.

MEMORANDUM

The Law Court has repeatedly said that the decisions of the federal courts construing the federal rules upon which the Maine rules are modeled are entitled to great weight. Westman v. Armitage, 215 A.2d 919, 921 (Me. 1966); Kittery Electric Light Co. v. Kittery, 219 A.2d 744, 747 (Me. 1966 Wormelle v. George, 325 A.2d 4, n.. 3 (Me. 1974); and Allen v. Cole Realty, Inc., 325 A.2d 19 (Me. 1974).

The primary purpose of the procedural rules is to promote the ends of justice. Rule 1, Maine Rules of Civil Procedure. See: Wright & Miller, Federal Practice & Procedure, Civil 2d, §1029 (1987). The rules also embody strong policy considerations favoring the resolution of actions on their merits. Traguth v. Zuck, 710 F.2d 90, 94 (2nd Cir. 1983); Meehan v. Snow, 652 F.2d 2 4 277 (2nd Cir. 1981); and Smith-Weik Machinery Corp. v. Murdock Machine & Engineering Co., 423 F.2d 842, 844 (5th Cir. 1970). Dismissals with prejudice and defaults "are drastic sanctions, termed 'extreme' by the Supreme Court." Poulis v. State Farm Fire & Casualty Co., 747, F.2d 863, 863-64 (3rd Cir. 1984). "Dismissals must be a sanction of last, not first, resort." Ibid., at 869. "The decision is committed to the sound discretion of the ... court, but [a]n abuse of discretion need not be glaring to justify reversal.' The narrow scope of the ... court's discretion stems from "strong policies favoring the resolution of genuine disputes on the merits,' and for the same reasons, 'doubts are to be resolved in favor of a trial on the merits." Traguth v. Zuck, 710 F.2d at 94. "The sanction of dismiss is the most severe sanction a court can apply, and its use must be tempered by a careful exercise of judicial discretion." Richman v. General Motors Corp., 437 F.2d 196, 199 (1st Cir. 1971). "The decided cases, while noting that a dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff." Ibid. See: Sheepscot Land Corp. v. Gregory, 383 A.2d 16, 22 (Me. 1978).

The Law Court, nevertheless, affirmed the Superior Court's decision to dismiss the plaintiffs' complaint for want of prosecution

stating only that it was "within the proper exercise of [the trial court's] discretion" and citing Westbrook v. Wallace, 478 A.2d 687, 689 (Me. 1984).

A few minutes after trial was scheduled to begin in the Westbrook v. Wallace case, the plaintiffs' attorney called and informed the clerk that he was ill and unable to attend. In view of the attorney's call, the trial court entered a conditional order dismissing the plaintiffs' action with prejudice but allowing the dismissal to be stricken if, within ten (10) days:

> (a) The Plaintiffs' Counsel presents sworn testimony of two doctors that he in fact was ill and unable to attend Court on th[at] date[, and]
> (b) Plaintiffs' Counsel pays the costs for the Defendant and Defense Counsel, including attorneys fees, for their appearance in Court on th[at] date.

Ibid. at 688 (emphasis in original). Four days later the plaintiffs' attorney responded to the conditional order of dismissal by filing the affidavits of two physicians. The trial court then scheduled a hearing on the plaintiffs' request to strike the dismissal. After hearing at which the two physicians both testified, the trial court found that:

> plaintiffs' counsel consulted the two doctors ... only after he was advised ... of the dismissal and the conditions for reinstatement of the case. Counsel consulted one doctor between 11:00 a.m. and 1:00 p.m. ... and consulted the second doctor at approximately 1:30 p.m. on the same day. ... [The plaintiffs'] counsel related different symptoms of his ailment to the two doctors and ... both characterized their objective findings of illness as "minimal" or "few." Finally, the justice found as fact that counsel's illness was pretextual and that the true reason for his failure to appear was that he did not want to appear before the particular presiding justice.

Ibid. Although denying the plaintiffs appeal, the Law Court added the following "word of caution":

> [The power to dismiss] should be exercised only with full appreciation and consideration of the plight of the plaintiff. In many cases an innocent plaintiff may be deprived of a valid claim because of an action or inaction of his representative. Although such a result is consistent with the principles of agency, it runs counter to the values underlying our system of justice which favors resolution on the merits. . . . In many instances our trial courts would do well to consider, as they have in the past, a lesser sanction than dismissal, Only when conduct . . . seriously threatens the ability of the court to manage its own affairs should dismissal with prejudice be considered. Less serious forms of . . . neglect may be adequately addressed through financial sanctions.

Ibid. at 689-90.

In sharp contrast to the circumstances in the Westbrook v. Wallace case, Plaintiff Linda E. Stanley's inability to appear for trial was not the result of "contumacious" conduct, there was no "clear record of delay," and there was there no "neglect" of any kind, which might justify the dismissal of the plaintiffs' complaint. On the contrary, Linda Stanley is a senior federal official the performance of whose official duties initially precluded, and then interfered with, her appearing for trial. Having successfully rearranged her official obligations in Washington, D.C., she made a valiant, though unsuccessful, effort to travel to Maine for trial. To paraphrase Justice Harlan writing for the majority in Link v. Wabash Railroad Company, 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1386 (1962), this is a case in which Linda Stanley's failure to appear for trial "was due to inability fostered neither by . . . [her] own conduct nor by circumstances within [her] control." Link, 370 U.S. at 636. Under such circumstances, the trial Court's dismissal exceeded the narrow scope of its discretion and was an abuse of that discretion. Traguth v. Zuck, 710 F.2d 90, 94 (2nd Cir. 1983); and Aghnides v. Marmon Group, Inc., 344 F.Supp. 829, 834-35 (S.D.W.Va. 1972). See: Smith-Weik Machinery Corp. v. Murdock Machine & Engineering Co., 423 F.2d 842, 843-44 (5th Cir. 19,0); Fenner v. Dependable Trucking Co., inc., 716 F.2d 598, 598 (9th Cir. 1983);

Latham v. Crofters, Inc., 492 F.2d 913, 916 (4th Cir. 1974); Gaspar v. Kasam, 493 F.2d 964, 968-69 (3rd Cir. 1974); and Royster v. Lederle, 128 F.2d 197, 200 (6th Cir. 1942).

Due to the severity of a dismissal or default, and the constitutional complications of such action, the Law Court has observed that "the trial court's discretion in imposing either ultimate sanction is narrow indeed and will be given close scrutiny on appeal." Pelletier v. Pathiraja, 519 A.2d 187, 190 (Me. 1986).

The fundamental requirement of Constitutional due process under the Fourteenth Amendment is the meaningful opportunity to heard. Grannis v. Ordean, 234 U.S. 385, 394, 58 L.Ed. 1363, 34 S.Ct. 779 (1914); Collins v. Hoke, 705 F.2d 959, 963 (8th Cir. 1983); and Adams v. Wainwright, 512 F.Supp. 948, 954 (N.D.Fla. 1981). Constitutional due process also requires that the opportunity to be heard be at a meaningful time, in a manner appropriate to the situation and must be tailored to the capacities and circumstances of those who are to be heard. Goldberg v. Kelly, 397 U.S. 254, 268-69, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970); and Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1950). A meaningful hearing means, among other things, a hearing at which the plaintiff could be present to present her case and have its merits fairly judged. Logan v. Zimmerman Brush Co., 455 U.S. 422, 433, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1981); and Pollack v. Baxter Manor Nursing Home, 716 F.2d 545, 546-47 (8th Cir. 1983).

In the present case. the plaintiffs effectively were denied the opportunity to be heard and their fundamental right to assert their claim was terminated when the trial court denied their motion to continue the trial sufficiently to allow Linda Stanley to be present to testify. Inasmuch as the plaintiffs' other witness then was in London and unavailable for trial and Linda Stanley was precluded initially by her official duties as a senior Justice Department official and then, having resolved those conflicts, was unable to obtain air passage to Maine, the plaintiffs were denied their Fourteenth Amendment right to due process. See also: Halperin v. Kissenger, 606 F.2d 1192 (D.C. Cir. 1979); Pension Benefit Guaranty Corp. v. LTV Steel

Corp., 119 F.R.D. 339 (D.N.Y. 1988); and U.S. v. Miracle Recreational Equipment Co., 118 F.R.D. (D. Iowa 1987) pertaining to the policy of accommodation afforded senior government officials with regard to discovery.

WHEREFORE, the plaintiffs pray that their motion for rehearing be granted, that their appeal be sustained, and that this matter be remanded to the Superior Court with instructions to vacate the Court's orders of February 2, 1996 and March 19, 1996, vacate that portion of the Court's order of July 27, 1995 which denied the plaintiffs' motion for leave to amend their complaint, and restore the plaintiffs' action to the docket for new trial and such other proceedings as may come before the court.

Dated at Portland, Maine this fourteenth day of January, 1997.

/s/ Ralph W. Brown

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